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In The Supreme Court of the United States

VERNA M. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. WHETHER THE WRIT SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT HAS SANCTIONED DECISIONS BY THE TRIAL COURT THAT CONFLICT WITH OTHER COURTS OF APPEALS OR WITH RELEVANT DECISIONS OF THIS COURT INCLUDING THE READING OF A FALSE EXCULPATOY STATEMENT INSTRUCTION DISAPPROVED BY THE EIGHTH CIRCUIT; THE REFUSAL OF DEFENDANT'S PROFFERED THEORY OF DEFENSE GOOD FAITH INSTRUCTION IN CONTRADICTION OF ELEVENTH CIRCUIT PRECEDENT; AND, AFFIRMING UNCONSTITUTIONALLY IMPROPER REMARKS BY THE PROSECUTION IN CLOSING ARGUMENT.

B. WHETHER THE WRIT SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S DECISION REGARDING WHICH GUIDELINES BOOK TO USE CONFLICTED WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

C. WHETHER THE WRIT SHOULD BE GRANTED BECAUSE THE OPINION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN APPRENDI V. NEW JERSEY, 530 U.S. ____, 147 L.ED. 435 (2000)

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1999

VERNA M. LEWIS,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

Verna M. Lewis petitions for a writ of certiorari to review a judgment of the Fourth Circuit Court of Appeals affirming her conviction and sentence in the United States District Court for the Western District of Virginia.

OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals affirming Lewis's conviction is published and reproduced at Appendix 1. United States of America v. Lewis, _____ F.3rd. ____ (4th Cir. 2000).

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on December 19, 2000, and the Defendant filed a timely petition for rehearing and petition for rehearing en banc. Those petitions were denied on January 18, 2001. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254. The Fourth Circuit Court of Appeals had jurisdiction by virtue of 28 U.S.C. Section 1291.

STATUTES INVOLVED

26 U.S.C. Section 7206(1)

Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or 26 U.S.C. Section 7212(a)

Attempts to interfere with administration of Internal revenue laws. (a) Corrupt or forcible interference. Whoever corruptly or by force of threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

STATEMENT OF THE CASE

This criminal tax case involved the alleged filing of false tax returns by Verna M. Lewis, a physician. The district court had jurisdiction pursuant to 18 U.S.C. Section 3231 and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. Section 3742.

She was convicted of eight tax-related offenses and sentenced to eighteen months incarceration, a fine of $10,000.00, and restitution of $105,651.59.

The United States accused Dr. Lewis of taking personal expenses as business deductions in tax years 1991, 1992, and 1993 in violation of 26 U.S.C. Section 7206. She also was convicted of making false statements to and providing false documents to an IRS agent during the course of a civil tax audit in violation of 26 U.S.C. Section 7212 and 18 U.S.C. Section 1001.

On appeal, the Fourth Circuit Court of Appeals left unaddressed Dr. Lewis's issues that challenged her convictions and affirmed the jury's verdict. With regard to sentencing, the appellate court reversed the award of restitution and affirmed the remainder of the sentence.

The facts presented at trial indicated that in 1988, Lewis accepted a position as a physiatrist, a specialty of medicine that deals with physical medicine and rehabilitation, at Lewis-Gale Hospital, in Roanoke, Virginia.

In 1988, Dr. Lewis and Lewis-Gale Hospital entered into a guaranteed income agreement. It provided Dr. Lewis an income guarantee with advances of income made to her on a quarterly basis. Pursuant to the Agreement, Dr. Lewis received income in 1988 and 1989 for which she received IRS Form 1099's and which she declared as income. After two quarterly payments, an accounting determined that her actual income was greater than the guaranteed sum. Consequently, she entered a promissory note with the Hospital requiring her to make monthly payments to the Hospital until the $39,909.00 was repaid. Thus, she paid the Hospital monthly payments totaling $12,000.00 in 1990, $24,000.00 in 1991,

and the remainder of the advance in 1992.

In 1988, Dr. Lewis hired the CPA, William White of Saunders and White, to assist her with the accounting for her practice and to prepare her tax returns. White provided her with a "one-write" accounting system. The system included checks and a carbon journal beneath the checks that in theory recorded the date, amount, and purpose of the check simultaneously with the writing of the check.

The evidence indicated that the Hospital provided Dr. Lewis an office, cleaning services, and repair and maintenance. However until December, 1994, Dr. Lewis's office was barely adequate. It was an old patient's room with a desk, a filing cabinet and a couple of plastic chairs. It contained no bookcases or amenities. As a result, in the spring of 1990, Dr. Lewis began the construction of an addition to her home which was composed of an office and a room with exercise equipment.

In 1993, Randy O'Neill, an IRS auditor, targeted Dr. Lewis as part of a special audit project involving physicians who received guaranteed income agreements. Initially, the audit was specifically tailored to the guaranteed income payments. Thus, in November 1993, O'Neill telephoned Dr. Lewis regarding the audit. In turn, Dr. Lewis executed a power of attorney to White so he could assist her in the audit.

White advised Lewis that the guaranteed income payments had been treated wrongly and that she should prepare amended returns immediately that excluded the guaranteed income repayments in years 1990, 1991, and 1992. Following White's advice, Lewis signed the amended returns he had prepared, and on December 10, 1993, Lewis and White delivered the amended returns and a $20,000.00 check to O'Neill.

O'Neill was surprised by this response to his audit. It raised a red flag, and O'Neill decided to expand the audit to all tax issues related to tax years 1990, 1991, and 1992. He issued information document requests to White and Dr. Lewis, and throughout the first part of 1994, Dr. Lewis provided

numerous documents and written responses to O'Neill.

The United States argued that the audit uncovered the deduction of personal expenses as business deductions. Those deductions included the following

The first were guaranteed income repayments. Dr. Lewis deducted the payments she made to Lewis-Gale Hospital to repay the guaranteed income advancement made to her in 1988 and 1989. Because Dr. Lewis had claimed the advancements as income in 1988 and 1989, the repayments were deductible in the years she paid them, 1990, 1991, and 1992. This deduction was complicated by the fact that White deducted the payments under the Schedule C category "rent," and they were not rent payments. Nevertheless, regardless of how they were classified, they were deductible.

White further complicated the matter, however, by deducting the total of the payments in 1989 in anticipation of the repayments. Even the government's expert witness testified that this was not the proper way to handle the income repayments. This was an accounting error that did not involve Dr. Lewis. She did not understand the law of guaranteed income repayments.

When the audit process began, White advised Lewis the repayments/rent payments should not have been deducted and he advised her to file the amended returns for 1990, 1991, and 1992 and deliver them to O'Neill on December 10, 1993, with a $20,000.00 check.

The second questioned deductions were those involving the office in Dr. Lewis's home. When Dr. Lewis constructed the addition to her home containing an office and second room with exercise equipment, she intended to use the office and exercise room solely for business purposes. She never saw patients or held business meetings in her office at home. However, she did research there, dictated there and stored patient files on her computer there. In addition, Dr. Lewis performed consulting and expert witness services which she prepared in her office at home.

Dr. Lewis purchased the exercise equipment for

business purposes as well. She testified:

> "I decided to use the equipment to ensure that when I prescribed exercises, therapeutic intervention for my patients, that I made sure as a well-bodied person that I could actually perform these myself and also to try and make sure that if there were any difficulties in performing a certain task that I might prescribe for my patients, I would hopefully recognize them before doing so".

When Dr. Lewis discussed the office with White he told her, "It will be too complicated to try and depreciate the building, but if you use items within your home for business purposes, then those items should be deducted."

Thus, Dr. Lewis paid for the furniture, bookcases, and exercise equipment for the addition out of her business account and gave the receipts to White. White then began a schedule of depreciation over a 10-year life.

At trial, the United States surmised that because Dr. Lewis had an office at Lewis-Gale Hospital, nothing in her home could be a deductible business expense. Thus, the government considered all deductions for the depreciation of assets in the home office and exercise room fraudulent.

However, uncontradicted expert testimony showed that the physical location of property did not determine its business use.

The final category of deductions taken by Dr. Lewis involves those expenses that for purposes of this brief will be considered strictly personal.

Dr. Lewis deducted a portion of the wages she paid her domestic worker, Ellen Teaford, who cleaned her home. She also deducted payments to Barry Williamson, who provided landscaping and lawn maintenance that Dr. Lewis attributed to the office addition to her home. She deducted payments made to Linwood Twine who constructed a patio at her home. She deducted a portion of the payments she made for a time-share at Stoney Creek Resort and one in the Bahamas, Diva Resorts.

During the audit White and Dr. Lewis provided

O'Neill with two documents involving a worker named Linwood Twine that O'Neill believed were suspicious. When he brought them to White's attention, White advised Dr. Lewis to seek counsel. She suggested an attorney she had used previously, but White convinced her to retain his friend, a co-city councilman.

In the latter half of 1994, the civil audit became a criminal investigation. Two Special Agents in the Criminal Division of the IRS investigated the case. During the course of the investigation they conducted a recorded question and answer session with White. Lewis's attorney also attended. During the question and answer session, White admitted that when he executed the amended returns he knew that they contained false or misleading information. He stated he knew there were student loan expenses that were improperly deducted. It was his intention to let the audit run its course and to make those adjustments when he received the report from O'Neill. At trial White stated, "I recognized that it was several things in these returns that could be debatable, and rather than isolate on one thing, I was prepared to wait until he presented the items in question, and if he picked up student loans, you know, it had to be excluded."

The IRS Special Agent in charge of White's investigation recommended that White be prosecuted.

On March 20, 1997, Lewis's counsel met with a tax division representative to plead Dr. Lewis's case. At that time he stated he was a friend of White, he served on city counsel with White, if the case went to trial he would not blame anything on White, and White would not have given bad advice.

Five days later, on March 25, 1997, the Chief Counsel of the IRS declined to refer White's case to the Department of Justice for prosecution. In October, 1997, White formally received immunity from prosecution and agreed to testify before the grand jury investigating Dr. Lewis.

White not only avoided prosecution, he avoided being reported to the Director of Practice. The evidence indicated

that IRS officials are required to report to the Director of Practice return preparers who are identified as either fraudulent or not proper return preparers. No such report was issued regarding William White.

Lewis was never questioned by the IRS Special Agents. She was never given the benefit of a full civil audit.

In 1996, Dr. Lewis terminated the services of William White and employed those of Samuel Golston, a CPA. In addition, Dr. Lewis incorporated her practice.

During the course of the trial, the United States subpoenaed Dr. Lewis's individual and corporate business journals. From these journals, the Untied States presented evidence that Dr. Lewis had paid Ellen Teaford from the corporate business account for her cleaning services in 1997. This expense was deducted as a business expense. In addition, the depreciation for the office furniture and exercise equipment also was deducted.

Subsequent to the jury's guilty verdict, a presentence report was prepared. It recommended a tax loss of $41,571.00, including federal and state income tax loss, but it provided no reasoning for that amount. The Defendant objected to the recommended tax loss.

At sentencing, both parties presented evidence through expert witnesses as to the correct calculation of tax loss. Three issues evolved: (1) whether to include the guaranteed income repayments ("rent") in the tax loss; (2) whether to credit the tax loss with accounting errors made by White that benefitted the IRS; and, (3) whether the depreciation of office furniture and exercise equipment and an Encyclopedia Britannica should be included as fraudulent depreciation.

In addition, the parties disagreed upon whether the 1992 or 1997 Sentencing Guidelines Manual should apply.

The Defendant's expert concluded that the correct tax loss was $13,103.00. This figure was calculated by accepting the government's trial exhibit of fraudulent deductions, and deducting White's errors, the depreciation and the encyclopedia.

The United States concluded that the tax loss was $47,617.90. This figure was calculated by taking the government's trial exhibit of fraudulent deductions and adding the "rent" and the deductions taken in later years for Ellen Teaford's payments and depreciation carried over from the indictment tax years.

The Court admitted that he could not segregate the fraudulent deductions from those that simply were negligent. Because he could not make that determination, he accepted the United States' exhibit 3, and found the tax loss to be greater than $40,000.00.

REASONS FOR GRANTING THE WRIT

1. **THE WRIT SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT HAS SANCTIONED DECISIONS BY THE TRIAL COURT THAT CONFLICT WITH OTHER COURTS OF APPEALS OR WITH RELEVANT DECISIONS OF THIS COURT INCLUDING THE READING OF A FALSE EX-CULPATORY STATEMENT INSTRUCTION DISAPPROVED BY THE EIGHTH CIRCUIT; THE REFUSAL OF DEFENDANT'S PROFFERED THEORY OF DE-FENSE GOOD FAITH INSTRUC-TION IN CONTRA-DICTION OF ELEVENTH CIRCUIT PRE-CEDENT; AND, AFFIRMING UNCONSTITU-TIONALLY IM-PROPER RE-MARKS BY THE PROSECUTION IN CLOSING ARGUMENT.**

A. THE TRIAL COURT READ A FALSE EXCULPATORY STATEMENT INSRUCTION THAT WAS AN INCORRECT STATEMENT OF LAW

Dr. Lewis challenged the Court's reading of the following instruction, "when a Defendant voluntarily and intentionally offers an explanation or makes some statement tending to show her innocence and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to such evidence is a matter for you to determine." Defendant objected to the giving of this instruction.

She also appealed the Court's decision to read the instruction to the Court of Appeals. By affirming the district court's decision regarding this instruction, the Court of Appeals contradicted the position of the Eighth Circuit Court of Appeals.

The "false exculpatory statement" instruction given in this case was erroneous. Dr. Lewis testified at trial. When a defendant testifies at trial it is improper to give the "false exculpatory statement" instruction unless the instruction is clearly limited to pre-trial false exculpatory statements. *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995). In addition, Dr. Lewis made no pre-trial false exculpatory statements subsequent to the instigation of the criminal investigation. Consequently, the instruction was unnecessary.

In *United States v. Cogdell*, 844 F.2d 179 (4th Cir. 1988), the Fourth Circuit approved the "false exculpatory statement" instruction contained in E. Devitt, C. Blackmar & M. Wolff Federal Jury Practice and Instructions, §15.12 (3d ed. 1987). That instruction provided, "conduct of a defendant including statements knowingly made and acts knowingly done, upon being informed of the crime that has committed or upon being confronted with criminal charges may be

considered by the jury... ." *Cogdell*, 844 F.2d at 181, quoting, E. Devitt, C. Blackmar, M. Wolff at §15.12.

Therefore the *Cogdell* instruction makes clear that the false statements referred to are those made by the defendant when confronted with criminal accusations prior to trial rather than the defendant's trial testimony. Without that distinction, when the defendant has testified at trial the instruction improperly emphasizes the defendant's testimony and improperly comments on the defendant's credibility at trial — a matter within the sound discretion of the jury.

In *Clark* the Court held that giving an instruction identical to the one at issue in this case was error. However, it decided that the error was harmless because the Court also had instructed the jury that the defendant's trial testimony should be judged in the same fashion as that of other witnesses. In the instant case, the Court did not give this saving instruction, and the jury was left to assume that the "false exculpatory statement" instruction applied to the defendant's trial testimony. Furthermore, the instruction was particularly improper under the circumstances of this case because once the IRS instituted a criminal investigation against Dr. Lewis she made no statements in response to the charges or accusations.

Thus, the jury only could have applied the instruction to Dr. Lewis's trial testimony. The implication was that if it did not believe Dr. Lewis's explanation at trial, then it could consider her testimony as consciousness of guilt. This is clearly reversible error, and the convictions should be reviewed by this Court and reversed.

B. THE COURT ERRED IN REFUSING TO GIVE THE DEFENDANT'S PROFFERED THEORY OF DEFENSE GOOD FAITH INSTRUCTION.

The Defendant proffered a defense of good faith instruction to the Court as to Counts Five, Six, Seven,

and Eight. The Court refused the instruction. Generally speaking, a defendant is entitled to a jury instruction if: (1) there is a foundation in law and evidence to support it; and, (2) it is requested. *Mathews v. United States*, 485 U.S. 58, 63 (1988). In the instant case, the Defendant's proffered instruction was supported by the law and the evidence. The Defendant's good faith belief that she was not violating tax laws is indeed a defense to the tax charges in the indictment. *Cheek v. United States*, 498 U.S. 192, 202 (1991). Furthermore, the evidence supported the Defendant's belief that she took the deductions at issue because she believed them to be lawful even if that belief was unreasonable.

Yet, the Court refused the instruction. The Court indicated that its definition of "willfully" and "knowingly" encompassed the good faith defense. However, those instructions were not included within the instruction setting forth the elements of 26 U.S.C. § 7206. Therefore, they did not serve to alert the jury to good faith as a defense to that offense. For example, although the Court instructed the jury that "knowingly" means that the act was done voluntarily and intentionally and not because of mistake or accident, the Court's instruction concerning the elements of 26 U.S.C. § 7206 did not include the requirement that the Defendant acted "knowingly". Thus, the instructions as a whole do not properly inform the jury of the defense of good faith, and it was error not to give the Defendant's proffered good faith instruction. *United States v. Morris*, 20 F.3d 1111, 1113 (11th Cir. 1994); see, *Cheek v. United States*, 498 U.S. 192 (1991). In *Morris*, the Court held that instructions similar to those in the case at bar were inadequate to convey properly the asserted good faith defense. The Court explained that "in defining the elements of the crime, the court used the term 'willfully', but not 'knowingly'. This was not an incorrect statement of the law in itself. Later in the instructions, however, the court defined the term 'knowingly' as meaning 'that the act was done voluntarily and intentionally without mistake or accident'. The

only mention of mistake or accident in the relevant portion of the charge is found in the definition of 'knowingly'. However, that term was not part of the court's definition of the crime itself; therefore, the jury under these instructions, was not adequately directed to consider the appellant's mistake-of-law- or fact defense." *Id.* at 1117.

The instructions in the instant case have exactly the problems addressed in the *Morris* case. Therefore, the Fourth Circuit's affirmance in this case is in conflict with one of her sister circuits, and this matter should be reviewed by this Court.

C. IMPROPER REMARKS BY THE GOVERNMENT DURING TRIAL SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS.

The standard of review for this question is plain error as it was not raised during trial.

During the United States' closing argument, the prosecutor argued, "Consider the fact that [Dr. Lewis is] also hoodooing Mr. Golston still, recently." This comment associated Dr. Lewis, an African-American physician, with the black witch doctors of Africa, the West Indies, and the deep South. In so doing, the remarks improperly projected race into the jury's deliberations.

In Webster's Dictionary, "Hoodoo" is defined as "voodoo", and "voodoo" is defined as "a primitive religion based on a belief in sorcery and in the power of charms, fetishes, etc.; it originated in Africa and is still practiced, chiefly by natives of the West Indies."

In The Hutchinson Encyclopedia, "voodoo" is described as a "set of magical beliefs and practices, followed

in some parts of Africa, South America, and the West Indies, especially Haiti. It arose in the 17th Century on slave plantations as a combination of Roman Catholicism and West African religious traditions: believers retain membership in the Roman Catholic church. It was once practiced in New Orleans and other areas of southern USA by African-Americans."

The racial nature of the word, "Hoodoo", is described in the book, Folk Beliefs of the Southern Negro. That resource makes abundantly clear the association of the "Hoodoo" doctor with a black witch doctor who engages in conjuration and voodoo. Puckett, Newbell, Folk Beliefs of the Southern Negro, (The University of North Carolina Press, 1926).

Therefore, in stating that Dr. Lewis had "Hoodooed" Golston, the government improperly reduced her position as an African-American physician to a "Hoodoo-doctor" who uses magic and conjuration.

"Improper remarks during closing argument do not always mandate retrial. The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *U.S. v. Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993). The test for reversible prosecutorial misconduct generally has two components: that (1) the prosecutor's remarks or conduct must in fact have been improper, and (2) such remarks or conduct must have prejudicially affected the Defendant's substantial rights so as to deprive the Defendant of a fair trial. *Id.*; *U.S. v. Brockingham*, 849 F.2d 872, 875 (4th Cir. 1988).

There is no question that remarks that inject race into a trial are improper. In *McFarland v. Smith*, 611 F.2d 414 (2d Cir. 1979), the Court aptly explained that when race is injected into a criminal trial the Defendant's rights under both the due process and equal protection clauses are offended. *Id.* at 416.

Federal Courts have long condemned racially inflammatory remarks during governmental summation. "Racial fairness of the trial is an indispensable ingredient of

due process and racial equality is a hallmark of justice. Appeals to racial passion can distort the search for truth and drastically affect a juror's impartiality." *U.S. v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990). See also, *U.S. v. Hernandez*, 865 F.2d 925 (7th Cir. 1989) (the Constitution prohibits a prosecutor from making race-conscious arguments since it draws the jury's attention to a characteristic that the Constitution generally demands that the jury ignore).

Recently, in *U.S. v. Cannon*, 88 F.3d 1495 (8th Cir. 1996), the Eighth Circuit reversed defendants' convictions where during the prosecutor's closing argument, he twice referred to the defendants, African-Americans, as "bad people". The Court noted that "referring to defendants as 'bad people' simply does not further the aims of justice or aid in the search for truth, and is likely to inflame bias in the jury and to result in a verdict based on something other than the evidence." *Id.* at 1502.

In the instant case, the prosecutor's remark that Defendant had "Hoodooed" her accountant raised the issue of race, regardless of whether it was intended or predicted. Moreover, the reference had no logical purpose or justification. Therefore, the comments were unconstitutionally impermissible.

Furthermore, the injection of race into the trial undermined the jury's impartiality. "Nothing is more fundamental to the provision of a fair trial than the right of an impartial jury. The impartiality of the jury must exist at the outset of the trial and it must be preserved throughout the entire trial." *Miller v. North Carolina*, 583 F.2d 701, 706 (4th Cir. 1978). Here, the government's closing argument appealed to the jury's passions and prejudices by comparing Dr. Lewis to a "Hoodoo" doctor.

Even if it was the government's attempt to suggest to the jury that Dr. Lewis was misleading Mr. Golston the same way that she misled William White, it should have simply said as much. By referring to her conduct as

"Hoodooing", the government unnecessarily injected race into the proceeding. It is significant that this term historically has been associated with black witchcraft and black medicine. It is also significant that Dr. Lewis is an African-American and that she is a medical doctor. These coincidences may appear too strong to have been inadvertent, but even assuming that they were, they unconstitutionally injected race into the jury's deliberations.

For this reason, the jury verdict finding Dr. Lewis guilty must be reversed. "The evils of racial prejudice lurk too frequently throughout the administration of criminal justice. They must be condemned whenever they appear." The Constitution forbids the racial remarks that were made in the summation that preceded Dr. Lewis's conviction. Therefore, she is entitled to a new, impartial trial.

Moreover, throughout the government's closing, it improperly stated that the defendant lied when she testified.

The Fourth Circuit has recognized that it is highly improper for the government to refer to the defendant as a "liar" or to express its opinion of the veracity of the defendant. *U.S. v. Moore*, 11 F.3d 475, 481 (4th Cir. 1993).

The entire theme of the government's case was that the Defendant "lied and cheated and cheated and lied." Throughout the government's summation, it accused her of lying at every turn. It stated, "the evidence in this case supports that on no less than 203 occasions, the defendant deceived, misled, lied, falsified by oral or written statement her communications to those people that needed to know the truth. Her CPA needed to know the truth, the revenue agent needed to know the truth, the IRS, in taking her tax returns, needed to know the truth, the grand jury needed to know the truth, but on no less than 203 occasions what they got was something else." This argument is improper not only because it implies that the Defendant was a liar, but also because it implies that she lied to the grand jury when in fact she did not even testify before the grand jury.

The prosecutor further crossed the line of demarcation and directly stated that Dr. Lewis lied to the jury. It stated, "the defendant's testimony on this issue is totally preposterous" and "the defendant has lied and misrepresented things to Mr. White. She has lied to the IRS in filing tax returns. She has lied to Mr. O'Neill. She has asked others to lie to Mr. O'Neill. She has given false documents. She has lied through the testimony, or attempted to encourage and advise Ms. Ellen Teaford to lie to the grand jury, and she came in here under oath and lied to you. There is no one else to lie to." (emphasis added).

The United States again expressed its opinion of Dr. Lewis's credibility in its rebuttal argument. When referring to Dr. Lewis's timing, the government stated, "If this is a woman who has been done so wrong by such a bad accountant and a bad guy, why did she wait until the last day of the jury trial to tell that story? If that was a true story, why wasn't she telling it? Well, Mr. Anderson tells you, Well, she was represented by, you know, Bill White. He was somehow manipulating her defense. Well, Mr. Anderson has been representing her for a year and a half and he's no slouch. If that was a true story and there's some merit to it, why hasn't it been told?"

This argument is improper for several reasons. First, it wrongly comments upon the Defendant's right to remain silent at every stage of the proceeding. It penalizes the Defendant's invocation of that right by permitting the government to argue that because the testimony was not told prior to the trial, it is tainted and unbelievable. The government may argue that the Defendant "opened the door" for this argument. However, regardless of whether the Defendant "opened the door" to comments that Dr. Lewis told her story for the first time at trial, she did not "open the door" to argument that her credibility is suspect solely because she previously invoked her right not to incriminate herself. Furthermore, the government's comment that she waited until

"the last day of trial" was improper because the order of proof in a criminal trial dictates when a defendant testifies. Does the government suggest that she should have testified on the first day of the government's case in chief?

Clearly, these arguments were wholly improper as they directly accused the Defendant of lying to the jury, and it is the function of the jury, not the prosecutor, to determine who is telling the truth.

Finally, the government improperly infringed upon the Defendant's right to be presumed innocent. In the opening summation, the United States argued, "we all understand that the evidence does not support innocence on any count. There is no suggestion that she is innocent of any." Later, it stated, "The defendant was in an indefensible position. She had no defense." These comments clearly violated the Defendant's right to be presumed innocent, because, of course, an accused need not present evidence of her innocence, nor must she present a defense. It is only the government that bears any burden of proof.

The only remaining question is whether these remarks, taken as a whole, prejudiced the Defendant's substantial rights so as to deprive her a fair trial. A number of factors are considered in evaluating prejudice: the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; whether the remarks were isolated or extensive; absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and, whether the comments were deliberately placed before the jury to divert attention to extraneous matters. *U.S. v. Mitchell*, 1 F.3d 235, 241 (4th Cir. 1993).

In this case, the credibility of Dr. Lewis was crucial to her defense. She testified before the jury and explained that she believed that many of the questioned tax deductions were lawful and that she relied upon her accountant, William White, to attend to her affairs. She testified that she relied upon his advice at each stage of the IRS audit. William White, on the other hand, testified that Dr.

Lewis instructed him as to which deductions to take and that he gave her good advice that she chose to ignore. The swearing contest that arose between Dr. Lewis and William White became the central issue in the trial. Consequently, the government's accusations that Dr. Lewis lied at trial clearly prejudiced the accused. Moreover, the comments permeated the government's case. Its rallying cry, "lying and cheating and cheating and lying" was central to its aim of discrediting the credibility of Dr. Lewis in order to bolster the character of its star witness, William White.

Finally, the comments were so pervasive that they must have been deliberate. The government's entire summation concentrated upon the mendacity of Dr. Lewis, rather than the elements of the offenses.

Accordingly, the error amounts to plain error and should be considered by this Court.

2. THE WRIT SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S DECISION REGARDING WHICH GUIDELINES BOOK TO USE CONFLICTED WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The dates of the offenses alleged in the indictment straddle two versions of the Sentencing Guidelines. When Count Five, filing a false tax return for tax year 1992, was committed in April, 1993, the 1992 version of the Guidelines was in effect.

The Guideline Amendments that took effect in November, 1993, significantly increased the punishment for the offenses, including Count Five. First, under Section 2T4.1, the offense levels in the tax table were increased for amounts of loss. For example, under the 1992 version a loss of more than $40,000.00 was an offense level eleven, a loss of more than $20,000.00 was an offense level ten, and a loss of

more than $10,000.00 was an offense level nine. By contrast, under the 1993 version, a loss of more than $40,000.00 was an offense level thirteen, a loss of more than $23,500.00 was an offense level 12, and a loss of more than $13,500.00 was an offense level eleven.

Furthermore, under the 1992 version of the Guideline, the tax loss was 28% of the amount by which the gross income was under-reported. In the later version, the tax loss is 28% of the unreported gross income "unless a more accurate determination of the tax loss can be made." In this case, the Court accepted a sum that was greater than 28% of the unreported income. Thus, the application of the later Guidelines version resulted in a harsher penalty.

The question of which Guidelines book applies when offenses straddle Guidelines versions involves application of the guidelines and principles of the constitutional prohibition against *Ex Post Facto* laws.

As a general rule, a Defendant should be sentenced under the Guidelines Manual in effect at the time of sentencing. U.S.S.G. §1B1.11. However, if use of the manual in effect at the time of sentencing would violate the *Ex Post Facto* Clause, Art. 1, §9, Constitution of United States, then the district court must use the manual in effect at the time of the offense of conviction. U.S.S.G. §1B1.11; *United States v. Heater*, 63 F.3d 311, 331 (4th Cir. 1995). Only one book can be applied. It would always be against Guidelines dictate to use one book for one offense and one book for another offense.

Section 1B1.11(b)(3) provides that if the defendant is convicted of two offenses, one committed before, and the second after a revised edition became effective, the revised edition applies to both offenses.

However, it is clear that if §1B1.11(b)(3) would result in a violation of the *Ex Post Facto* Clause then it cannot be implemented.

The Fourth Circuit *recognized a split in the circuits in its decision.*

The Third and Ninth Circuits have determined that the principle contained in §1B1.11(b)(3) does violate the *Ex Post Facto* Clause when it results in the imposition of a harsher penalty for the offenses committed prior to enactment of the manual in effect at the time of sentencing. *United States v. Ortland*, 109 F.3d539, 547 (9th Cir. 1997); *United States v. Bertoli*, 40 F.3d 1384, 403 (3rd Cir. 1994). At least the Eleventh, Eighth, and First Circuits have ruled to the contrary. *United States v. Bailey*, 123 F.3d 1381, 1403-07 (11th Cir. 1997); *United States v. Cooper*, 35 F.3d 1248, 1250-1253 (8th Cir. 1994); *United States v. Regan*, 989 F.2d 44, 45 (1st Cir. 1993). In *Lewis* the Fourth Circuit followed these circuits.

The *Bertoli* and *Ortland* decisions are better reasoned and should be made uniform in all the circuits. There is no question that application of the later manual to Count Five results in increased punishment, and the *Ex Post Facto* Clause prohibits the application of more stringent penalties than were authorized at the time of the offense. The fact that the other Counts were committed later and the Sentencing Commission demands the "one-book" rules does not obliterate the *Ex Post Facto* violation. Thus, in order to reconcile *Ex Post Facto* concerns and the "one-book rule" the Court must apply the earlier more favorable manual. *Bertoli*, 40 F.3d at 1403-1404.

Therefore, the trial court's use of the 1993 manual violated the *Ex Post Facto* Clause and Dr. Lewis's sentence must be reversed and remanded for a new sentencing under the 1992 Manual. This Petition should be granted to determine this issue.

3. THE WRIT SHOULD BE GRANTED BECAUSE THE OPINION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN APPRENDI V. NEW JERSEY, 530 U.S. ____, 147 l..ED. 435 (2000)

The District Court below included in the tax loss computation deductions taken in tax years not charged in the indictment, 1994-1997. This increased the offense level and the sentencing range of the Defendant under the United States Sentencing Guidelines. Consequently, including in the sentencing tax loss deductions made in those unindicted years increased the Defendant's sentence in excess of the sentence she would have received based solely upon the indictment and convictions. Under Apprendi, this sentencing increase is unconstitutional.

Apprendi holds that under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Apprendi, 147 L. Ed 2d at 446. The reasoning in Apprendi leads inescapably to the principle that under these constitutional provisions a defendant's sentence cannot be increased based upon conduct that has not been charged, submitted to the jury, and proven beyond a reasonable doubt.

In Apprendi the Court explained that historically a defendant's punishment was fixed by the conviction and verdict itself, which were obtained only after the constitutional guarantees of due process, notice, jury trial, and proof beyond a reasonable doubt. Thus, the defendant had notice at the time he committed a crime of the exact punishment he faced. It developed that judges were given more discretion in sentencing; however, the discretion was limited to imposing a judgment within a range or limits fixed by law. "The historic link between verdict and judgment and the consistent limits on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Id. at 450. The Court rejected such "legislative schemes" and

endorsed the rule that, "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Id. at 455.

It follows that it is unconstitutional for a judge to sentence a defendant for offenses for which he has never been charged and which have never been submitted to a jury for a reasonable doubt determination. It is true that the Defendant was not sentenced to a term that exceeded the maximum term for the offenses for which she was convicted. However, the Defendant's range of punishment under the mandatory United States Sentencing Guidelines was increased based upon facts and offense conduct that were not indicted and not determined by a jury beyond a reasonable doubt. There simply is no substantive difference between the range of punishment mandated by a criminal statute and that mandated by the United States Sentencing Guidelines.

Furthermore, tax cases such as the one at bar are unique in that generally a Defendant is provided the benefit of a civil tax audit before any criminal investigation into alleged fraudulent deductions. Thus, in a civil setting a Defendant is provided an opportunity to contest the Service's determinations or to concede to the Service's decision without further investigation. In this case the Court included in the Defendant's criminal tax loss deductions taken in years that were neither a part of a civil tax audit or a criminal indictment.

Thus, this case falls within the holding of Apprendi, because inclusion of the unindicted conduct increased the Defendant's range of punishment. Such inclusion clearly violated the Defendant's Fifth and Sixth Amendment rights to due process and trial by jury and requires reversal of the defendant's sentence.

CONCLUSION

For these reasons, Petitioner requests that his Petition for Writ of Certiorari be granted and that the Fourth Circuit Court of Appeals be reversed.

Respectfully submitted,
VERNA M. LEWIS

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APPENDIX

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United States v. Lewis, ___ F.3d ___ 004016 (4th Cir. 2000)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
VERNA M. LEWIS, Defendant-Appellant.

No. 00-4016

Argued: September 29, 2000
Decided: December 19, 2000

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Samuel G. Wilson, Chief District Judge. (CR-98-57-R)

Before WILKINS and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed in part and vacated and remanded in part by published opinion. Judge Wilkins wrote the opinion, in which Judge Motz and Senior Judge Hamilton joined.

COUNSEL

ARGUED: Melissa Windham Friedman, Roanoke, Virginia, for Appellant. Gregory Victor Davis, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Anthony F. Anderson, Roanoke, Virginia, for Appellant. Paula M. Junghans, Acting Assistant Attorney General, Robert E. [Slip Op. 2] Lindsay, Alan Hechtkopf, Robert P. Crouch, Jr., United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

WILKINS, Circuit Judge:

Verna M. Lewis was convicted of numerous charges related to the filing of false income tax returns and now appeals her convictions and the resulting sentence. Among other things, Lewis maintains that application to her of the 1998 version of the *U.S. Sentencing Guidelines Manual* violated the Ex Post Facto Clause and that the district court improperly ordered her to pay restitution. We affirm Lewis' convictions and the application of the guidelines, but vacate the restitution order and remand for further proceedings regarding that aspect of Lewis' sentence.

I.

Lewis is a physiatrist, a physician who specializes in physical medicine and rehabilitation. In 1988, she was recruited to work for the Lewis-Gale Hospital in Salem, Virginia. As part of Lewis' employment package, the Hospital guaranteed Lewis an income of at least $125,000 for the first year. In 1993, the Internal Revenue Service (IRS) began an investigation of guaranteed-income agreements at Virginia hospitals. When Lewis' tax returns were reviewed as part of this investigation, IRS personnel discovered improper deductions for purported business expenses that were actually personal in nature. In an effort to conceal the improper deductions, Lewis presented falsified documents to IRS investigators. Lewis also filed a false tax return for the year 1992 and filed false amended tax returns for the years 1990, 1991, and 1992.

Lewis was charged with, and convicted of, various offenses in connection with these activities. She now appeals, raising numerous challenges to her convictions and sentence. We have carefully reviewed Lewis' arguments

related to her convictions and determined them to [Slip Op. 3] be without merit. Accordingly, we will not discuss them further. Some of Lewis' claims regarding her sentence, however, do warrant discussion.

II.

Lewis makes three challenges concerning her sentence. First, she contends that the district court violated the Ex Post Facto Clause when it applied the 1998 Guidelines Manual in calculating her sentence. Second, Lewis maintains that her due process rights were violated when the district court determined the tax loss, and hence the applicable guideline range, by a preponderance of the evidence. Finally, she argues that the restitution order entered by the district court is plainly erroneous. We address these contentions seriatim.

A.

Lewis was convicted of four counts of filing false tax returns. The first offense occurred on April 13, 1993, when Lewis filed a false tax return for the year 1992. The other three offenses occurred on December 10, 1993, when Lewis filed false amended tax returns for the years 1990, 1991, and 1992. In the interim, on November 1, 1993, the sentencing guidelines were amended so as to increase the base offense level for filing a false tax return. Specifically, Amendment 491 amended the tax table in U.S.S.G. § 2T4.1 so that a tax loss of more than $40,000 resulted in a base offense level of 13, rather than 11. *See* U.S.S.G. App. C, amend. 491 (1997).

The district court is to apply the Guidelines Manual in effect at the time of sentencing unless doing so would violate the Ex Post Facto Clause. *See* U.S.S.G. § 1B1.11(a), (b)(1), p.s.; *see also id.* § 1B1.11, p.s., comment. (backg'd.) (noting that "courts to date generally have held that the *ex post facto* clause does apply to sentencing guideline amendments that subject the defendant to increased punishment"). The

guidelines specifically instruct, however, that "[i]f the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." *Id.* § 1B1.11(b)(3), p.s. Pursuant to § 1B1.11, the district court applied the 1998 Guidelines Manual in determining Lewis' [Slip Op. 4] sentence.[1] Lewis maintains that because application of the 1998 Guidelines Manual resulted in increased punishment for the first incident of tax evasion, her sentence violates the Ex Post Facto Clause.

The question of whether the Ex Post Facto Clause is violated when a revised edition of the guidelines is applied to offenses that predate and postdate the revision is one that has divided the circuit courts of appeal. *Compare United States v. Vivit*, 214 F.3d 908, 917-19 (7th Cir.) (holding that application of revised Guidelines Manual to offenses that occurred both before and after revision, but which were grouped for sentencing purposes, did not violate Ex Post Facto Clause), *cert. denied*, ___ U.S. ___, 121 S. Ct. 388 (2000), *United States v. Kimler*, 167 F.3d 889, 893-95 (5th Cir. 1999) (same), *United States v. Bailey*, 123 F.3d 1381, 1406-07 (11th Cir. 1997) (same), *United States v. Cooper*, 35 F.3d 1248, 1250-52 (8th Cir. 1994) (same), *cert. granted, judgment vacated*, 514 U.S. 1094 (1995), *opinion reinstated*, 63 F.3d 761, 763 (8th Cir. 1995) (per curiam), *and United States v. Regan*, 989 F.2d 44, 48 (1st Cir. 1993) (holding that application of revised guidelines to offenses that occurred both before and after revision did not violate Ex Post Facto Clause), *with United States v. Ortland*, 109 F.3d 539, 545-47 (9th Cir. 1997) (holding that application of revised Guidelines Manual to offenses that occurred both before and after revision violated Ex Post Facto Clause), *and United States v. Bertoli*, 40 F.3d 1384, 1402-04 (3d Cir. 1994) (same).

The constitutional provision on which Lewis relies forbids the enactment of any "ex post facto Law." U.S. Const. art. I, § 9, cl. 3. The Ex Post Facto Clause prohibits, *inter alia*, the enactment of "any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (internal quotation marks omitted). Accordingly, a law violates the Ex Post Facto Clause when it is retrospective —*i.e.*, when it applies to events predating its enactment — and it disadvantages those to whom it applies. *See Lynce v. Mathis*, 519 U.S. 433, 441 (1997). The central concern of the ex post facto prohibition is "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Miller* [Slip Op. 5] *v. Florida*, 482 U.S. 423, 430 (1987) (internal quotation marks omitted). The Clause seeks to ensure "that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed," and guards against "arbitrary and potentially vindictive legislation." *Weaver*, 450 U.S. at 28-29.

We conclude that the guidelines provision of which Lewis complains, U.S.S.G. § 1B1.11(b)(3), does not violate the Ex Post Facto Clause. Section 1B1.11(b)(3) was added to the guidelines on November 1, 1993. Lewis therefore had ample warning, when she committed the later acts of tax evasion, that those acts would cause her sentence for the earlier crime to be determined in accordance with the Guidelines Manual applicable to the later offenses, and thus that the intervening amendment to the tax table would apply. Accordingly, it was not § 1B1.11(b)(3) that disadvantaged Lewis, but rather her decision to commit further acts of tax evasion after the effective date of the 1993 guidelines. *See Cooper*, 35 F.3d at 1250.

B.

This court has consistently held that, while facts necessary for conviction must be proved beyond a reasonable doubt in order to satisfy the requirements of due process, facts relevant to a sentencing determination need only be proved by a preponderance of the evidence. *See, e.g., United States v. Urrego-Linares*, 879 F.2d 1234, 1237-38 (4th Cir. 1989). In her reply brief, however, Lewis argues that her sentence was imposed in violation of the Due Process Clause because the tax loss on which her guideline range was based was not charged in the indictment and found by the jury beyond a reasonable doubt.[2] In making this argument, Lewis relies on the recent decision of the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. ___ 99478, 120 S. Ct. 2348, 2362-63 (2000), in which the Court held that "any fact that increases the penalty [Slip Op. 6] for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." [3]

Because Lewis did not raise this argument in the district court, our review is for plain error only.[4] *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 731-32 (1993); *see also United States v. Meshack*, 225 F.3d 556, 575 (5th Cir. 2000) (noting that *Apprendi* claims would be reviewed for plain error when no objection was raised before the district court); *cf. United States v. David*, 83 F.3d 638, 645 (4th Cir. 1996) (explaining that plain error review is appropriate when "an objection at trial would have been indefensible because of existing law, but a supervening decision prior to appeal reverses that well-settled law"). In order to establish our authority to notice an error not preserved by a timely objection, Lewis must show that an error occurred, that the error was plain, and that the error affected her substantial rights. *See Olano*, 507 U.S. at 732; *United States v. Cedelle*, 89 F.3d 181, 184 (4th Cir. 1996). Even if Lewis can satisfy these requirements, correction of the error remains within our [Slip Op. 7] sound discretion, which we "should not exercise . . . unless the error 'seriously

affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at 732 (second alteration in original) (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)); *see David*, 83 F.3d at 641.

We conclude that there was no error. The decision of the Supreme Court in *Apprendi* was, by its terms, limited to facts that increase punishment beyond the prescribed statutory maximum. Here, because no fact found by the district court in determining Lewis' sentence resulted in a penalty greater than the applicable statutory maximum, Lewis' due process rights were not violated. *See Meshack*, 225 F.3d at 576-77.

C.

Lewis next challenges the restitution order entered by the district court. Although the presentence report indicated that restitution was not an issue, at the sentencing hearing the district court imposed restitution of $105,651.69 as a special condition of supervised release.[5] This figure apparently was provided to the court by the Government during the sentencing hearing. The court did not make any factual findings as to the proper amount of restitution or as to Lewis' ability to pay. *See* 18 U.S.C.A. § 3556 (West 2000) (providing that a court must comply with 18 U.S.C.A. § 3664 in ordering restitution as a condition of supervised release); *United States v. Castner*, 50 F.3d 1267, 1277 (4th Cir. 1995) (explaining that § 3664(a) requires a district court to make explicit factual findings prior to entering an order of restitution). Accordingly, we vacate this aspect of Lewis' sentence and remand for further proceedings. [Slip Op. 8]

III.

In sum, we affirm Lewis' convictions and the application of the sentencing guidelines. However, we vacate the order of restitution and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

FOOTNOTES

[1] The relevant guidelines have not been amended since 1993.

[2] Lewis also argues that the district court failed to make adequate factual findings to support its calculation of the tax loss for sentencing purposes. We conclude that the district court made a reasonable estimate of the loss based upon the available facts. *See* U.S.S.G. § 2T1.1, comment. (n.1).

[3] *Apprendi* was decided after Lewis filed her opening brief, and she raised her due process claim in her reply brief, the next available opportunity. This court has held that "an issue first argued in a reply brief is not properly before a court of appeals." *Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996). There is some authority, however, for the proposition that special circumstances may justify deviation from this rule. *See, e.g., United States v. Valdez*, 195 F.3d 544, 546 n.3 (9th Cir. 1999) (observing that court may exercise discretion to consider argument raised in reply brief when issue is purely legal or review would prevent manifest injustice); *United States v. Darden*, 70 F.3d 1507, 1549 n.18 (8th Cir. 1995) (stating that court would not consider issues raised in reply brief "[a]bsent some reason" why the claims were not raised earlier); *cf. United States v. All Assets & Equip. of West Side Bldg. Corp.*, 58 F.3d 1181, 1191 (7th Cir. 1995) (holding that issue was not waived when raised at first opportunity); *cf. also Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that new rules of criminal procedure are retroactively available to cases pending on direct review). Because the claim is without merit in any event, we need not decide whether it was properly raised.

[4] We note that in addressing a similar claim, *United States v. Angle*, 230 F.3d 113 (4th Cir. 2000), conducted harmless-error review, which is the appropriate standard for issues first raised in the district court.

[5] Pointing to the Judgment and Commitment Order, which sets forth the restitution amount elsewhere than in the section pertaining to conditions of supervised release, Lewis argues that the district court improperly imposed restitution as part of her sentence. Because we vacate the restitution order for other reasons, we need not determine whether this technical error would require remand in and of itself.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 00-4016
CR-98-57-R

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

VERNA M. LEWIS

Defendant – Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing and is of the opinion that it should be denied,

IT IS **ORDERED** that the petition for rehearing and rehearing en banc is denied.

For the Court

/s/ Patricia S. Conner

Clerk

OPINIONS OF THE DISTRICT COURT

MS. FRIEDMAN: Well , Your Honor, I guess for the record we need to state that we tendered two good-faith defense instructions that were refused by the Court—

THE COURT: Right.

MS. FRIEDMAN: -- which I will give to the clerk.

THE COURT: I did give a good-faith instruction.

MS. FRIEDMAN: That's correct, we understand that and I won't argue it any further other than to say that those were our theory of defense instructions, and we don't' believe that the willfully instruction encompassed as much as these do and that's why we offered them. We believe it was correct under the law.

THE COURT: And I might state for the record that I did not find that they were tailored appropriately to this case for me to give them and that of course that courts have indicated that when the Court has appropriately instructed on the question of willfulness that it is a discretionary call as to good faith, and the Court has drafted one the Court believes to be—and has had the participation of counsel in the drafting of that—thought to be appropriate under the circumstances. The others are more broadly worded and I think inappropriate, and that is the reason that they have been denied.

* * *

MS. FRIEDMAN: And our last objection, Your Honor, is to the instruction given by the Court that when a defendant voluntarily and intentionally offers an explanation and then if it's proven to fall under consciousness of guilt, we don't believe that was supported by the evidence and it was improperly commented on by the prosecution.

THE COURT: All right.

* * *

THE COURT: As to the split of authority within the circuits as to what manual applies, the Court follows the reasoning and therefore the case of United States versus Bailey, 123 F.3d 1381, which holds that "application of 1B1.11 (b) (3) did not violate the ex post facto clause even thought it resulted in a position of a harsher sentence for the offense committed prior to the enactment of the guidelines in effect at the time of the sentence because a defendant knows when he continues to commit related crimes that he risks sentencing for all offenses under the latest amended sentencing guideline manual."

To the same effect is United States versus Cooper, 35 f 3d 1248, Eighth Circuit 1994. The court follows those and therefore will apply, will follow the 1993 amendments, which the Court views as no different from what is in effect for 1998, and will apply that manual.